

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE UNITED STATES OF AMERICA
for the use of MATHUSEK INCORPORATED,

AFFIDAVIT OF
JOHN RAY, ESQ.

Plaintiff,

-against-

J. KOKOLAKIS CONTRACTING, INC.,
SEABOARD SURETY COMPANY AND
ST. PAUL FIRE & MARINE
INSURANCE COMPANY,

Civil Action #05CIV9097

Judge William C. Conner

Defendants.

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STATE OF NEW YORK)
) ss:
COUNTY OF SUFFOLK)

John Ray, attorney, being duly sworn, states:

1. My firm represents Defendants. I am the owner of said firm, and an attorney admitted to practice in the United States District Court for the Southern District of New York. I make this Affidavit on behalf of Defendants in their Application for an Order Compelling Arbitration in Suffolk County, New York, in this matter. The Defendants proceed by my Affidavit because their Motion involves strictly documentary evidence and matters of law best addressed by an attorney.

2. Jurisdiction of this case arises under the Miller Act, 40 USC 3131 *et seq.*

3. Plaintiff has sued Defendants on October 25, 2005 for breach of contract. Plaintiff is a corporate subcontractor of J. Kokolakis Contracting, Inc. Plaintiff was to provide installation of a sports floor at West Point, U.S. Military Academy (Complaint and Exhibits thereto, Exhibit A herein). Plaintiff installed the floor, but did so by exceeding the contract price. Plaintiff performed additional work in performing the installation. Plaintiff billed

Defendant J. Kokolakis Contracting, Inc. for this work, purportedly pursuant to various "charge orders". Defendant J. Kokolakis Contracting, Inc. refused to pay the amount Plaintiff demanded, claiming instead that Plaintiff overcharged for the work and/or didn't obtain J. Kokolakis's approval for part of the work. Thus Plaintiff sued.

4. Defendants Seaboard Surety and Saint Paul Fire and Marine Insurance Company are the sureties on the bond as to this work, which is the reason that they are Defendants.

5. The Subcontractor Agreement between J. Kokolakis and Plaintiff calls for arbitration of all disputes between them via American Arbitration Association in Suffolk County, New York. The Agreement, on page 11 (Article 15, entitled "Disputes"), says *inter alia*,

"To the extent not resolved under the immediately preceding paragraph, any dispute between Contractor and Subcontractor shall, at Contractor's sole option, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. If Contractor elects to arbitrate, then the arbitration shall be conducted in Suffolk County, New York. The foregoing agreement to arbitrate shall be specifically enforceable in any court of competent jurisdiction." (Exhibit B)

6. This contract language is clear . It encompasses the claim of the Plaintiff herein.

7. Nonetheless, Plaintiff has refused arbitration. Plaintiff's attorney did so on Plaintiff's behalf, by letter to Defendants' attorney on July 24, 2006 (Exhibit C).

8. Plaintiff's attorney tries to carve out an exception to the subcontract clause cited above, in his letter. Defendants respectfully submit that the proposed exception is unavailing. The Subcontract applies. The entire relationship between Plaintiff and Defendants arose from and continued via the Subcontract, until completion of the work. There is no agreement which makes any such exception as that which Plaintiff's attorney attempts to establish.

9. Defendants therefore pray that the court will issue an order compelling arbitration of the matters in suit, before the American Arbitration Association, to take place in Suffolk County, New York.

10. No prior request for this relief has been made.

11. Therefore, Defendant respectfully moves the Court to enter an Order compelling arbitration of this dispute and staying all further proceedings in this action until arbitration has been completed within the terms of the agreement of the parties.

I declare under penalty of perjury that the foregoing is true and correct. Dated September 18, 2006

John Ray (JR 5938)

Sworn to before me this
day of September, 2006.

Notary Public

